

## COPYRIGHT ARBITRATION ROYALTY PANEL

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PREHEARING CONFERENCE

IN THE MATTER OF:

SATELLITE RATE ADJUSTMENT

DOCKET NO.

96-3 CARP-5RA

Tuesday,  
March 4, 1997CARP Hearing Room LM414  
Library of Congress  
101 Independence Ave., S.E.  
Washington, D.C. 20540

The above-entitled matter came on for hearing,  
pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson

THE HONORABLE JOHN W. COOLEY

THE HONORABLE JEFFREY S. GULIN

ALSO PRESENT:William Roberts, Copyright General Counsel, CARP  
Tanya Sandros  
Vivian Roque-Balboa

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ORIGINAL

APPEARANCES:On behalf of The Office of the Commissioner of Baseball:

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APPEARANCES: (CONT.)On behalf of BMI, Inc.:

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P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

MR. ROBERTS: I think just about everyone is here. Good morning, everyone. For those of you who do not know me, I am Bill Roberts, Senior Attorney of the Copyright Office for Compulsory Licenses. It is my distinct honor and privilege to in essence throw out the first pitch today and get this proceeding underway.

I have here today three very distinguished Judges who will serve as your Arbitrators. Your Chairperson is Lewis Griffith, sitting in the center. To Judge Griffith's left is Jeffrey Gulin.

THE HON. GULIN: Good morning.

MR. ROBERTS: And to Judge Griffith's right is Jack Cooley and they will be, of course, serving as your Arbitrators.

For those of you who are not all together familiar with our CARP proceedings, the Office has conducted the precontroversy discovery phase. We have issued all necessary rulings and orders in this proceeding and our task as of this moment right now is

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1 over until the hearing testimony is taken and the  
2 three Arbitrators write their decision at which time,  
3 of course, the decision will come back to us for the  
4 Librarian's review.

5 As a result of that, you should be  
6 directing your attention to our three Arbitrators,  
7 however, if you have procedural questions, questions  
8 about timing, when certain pleadings are due, you  
9 should contact us at the Copyright Office,  
10 specifically Tanya Sandros who is sitting in the back  
11 of the room. Thank you, Tanya. And she has done an  
12 excellent job in helping the formation of this  
13 proceeding and getting it ready for this stage, the  
14 actual hearings. And again if you have any procedural  
15 questions, you should direct them to Tanya and if  
16 Tanya needs to get in contact with Judge Griffith or  
17 any of the other Arbitrators, she will do so and get  
18 back to you with some information.

19 We also have a secretary that will be here  
20 on a part-time basis. Her name is Vivian Roque-  
21 Balboa. She is sitting out front right now. She will  
22 be glad to take any messages for you and handle any

1 pleadings or motions, etcetera, papers that you may  
2 need to file. She will also be assisting the  
3 Arbitrators in their daily work, including the listing  
4 and numbering of exhibits.

5 I think that about covers it. As you are  
6 aware today is, in essence, a pre-conference hearing,  
7 to set the schedule for this proceeding, to discussing  
8 billing and payment of these gentlemen as well as any  
9 other matters that you may be interested in raising  
10 today.

11 So unless -- does anyone have any  
12 questions of me? Very good. I wish everyone well and  
13 I guess we will be seeing you or at least hearing from  
14 you in six months when it comes time to file petitions  
15 to modify the decision.

16 (Laughter)

17 Judge Griffith, I turn it over to you and  
18 thank you very much.

19 CHAIRPERSON GRIFFITH: All right, thank  
20 you very much. I'm going to begin in a formal matter  
21 by swearing the reporter, if I may, please. Would you  
22 raise your right hand?

1 (Whereupon, the Court Reporter was sworn.)

2 Ladies and gentlemen, good morning. As  
3 Bill indicated, my name is Lewis Griffith. I am a  
4 retired Judge, well, being retired, why am I here?  
5 I'm with the 19th Judicial Circuit which is Fairfax  
6 County, Virginia, retired as a Chief Judge of that  
7 Circuit in 1990. I have been doing arbitrations and  
8 mediations in addition to sitting as a Judge Designate  
9 and with the Court of Appeals of Virginia since late  
10 fall of 1990.

11 Judge Gulin, I'm going to ask you very  
12 briefly to identify yourself.

13 THE HON. GULIN: Well, I'll certainly be  
14 much briefer. Obviously, my name is Jeffrey Gulin.  
15 I'm a former Administrative Law Judge until very  
16 recently with the State of Maryland, hearing all of  
17 the Agency cases for that state.

18 CHAIRPERSON GRIFFITH: All right, Judge  
19 Cooley?

20 THE HON. COOLEY: Yes, I'm Jack Cooley.  
21 I'm a former Federal Magistrate in Chicago and I've  
22 been doing dispute resolution as a sole practitioner

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1 since 1984.

2 CHAIRPERSON GRIFFITH: With that said, you  
3 now know who your panelists are and we are somewhat  
4 interested in knowing who you are. So I would ask, if  
5 you will, please, let's begin on the left here. If  
6 you will simply stand and identify yourself and tell  
7 us who you represent. We don't promise to remember  
8 each of you and your parties, however, it would be  
9 helpful to know.

10 Start with you, please, sir?

11 MR. HOCHBERG: Your Honor, my name is  
12 Philip Hochberg. And I am co-counsel for the Joint  
13 Sports Claimants.

14 CHAIRPERSON GRIFFITH: Thank you.

15 MR. GREENSTEIN: Your Honor, Gary  
16 Greenstein for the Joint Sports Claimants.

17 CHAIRPERSON GRIFFITH: Thank you.

18 MS. BEHAN: Your Honor, Kathleen Behan for  
19 the Joint Sports Claimants.

20 MR. GARRETT: Your Honor, Bob Garrett for  
21 the Joint Sports Claimants.

22 CHAIRPERSON GRIFFITH: Thank you. Yes?

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1 MS. WOODS: Michelle Woods of Covington &  
2 Burling for the Public Broadcasting Service  
3 representing the Public Television Claimants.

4 CHAIRPERSON GRIFFITH: Thank you.

5 MR. GLIST: Your Honor, I'm Paul Glist wit  
6 Cole Raywid & Braverman, representing the SBCA and the  
7 Carriers. These are the parties who pay the royalties  
8 which are being established to this CARP.

9 MR. SEIVER: Your Honor, John Seiver, also  
10 with Cole Raywid and for the Carriers and the SBCA.

11 CHAIRPERSON GRIFFITH: Thank you.

12 MR. PAUL: I'm Andy Paul and I'm the  
13 senior vice president of the Satellite Broadcasting  
14 Communications Association, these gentlemen referred  
15 to the SBCA.

16 CHAIRPERSON GRIFFITH: Thank you. Second  
17 row?

18 MS. ZIPURSKY: Diane Zipursky from NBC.

19 MR. GOODSPEED: Roger Goodspeed from ABC.

20 MR. GOTTFRIED: Barry Gottfried from  
21 Devotional Claimants.

22 MR. MIDLEN: John Midlen for the

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1 Devotional Claimants.

2 MR. REMINGTON: Mike Remington from the  
3 law firm of Drinker Biddle & Reath on behalf of  
4 Broadcast Music, Inc.

5 MS. WILLETT: Beverly Willett on behalf of  
6 the American Society of Composers, Authors and  
7 Publishers.

8 CHAIRPERSON GRIFFITH: Thank you. Next  
9 row.

10 MS. DAVIS: Jacqueline Davis from Crowell  
11 and Moring on behalf of the Broadcasters Claimants  
12 Group.

13 MS. HERRERA: Jessica Herrera, also with  
14 Broadcasters Claimants.

15 MR. STEWART: Your Honor, John Stewart,  
16 Crowell & Moring for Broadcasters.

17 MR. COLLINS: John Collins for Program  
18 Suppliers.

19 MR. MEYER: Your Honor, Chris Meyer for  
20 American Sky Broadcasting.

21 MR. HOOVER: Your Honor, Craig Hoover,  
22 Hogan & Hartson, American Sky Broadcasting.

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1 MS. CLEARY: Your Honor, Jacqueline  
2 Cleary, Hogan & Hartson for ASkyB.

3 MS. DONOGHUE: Your Honor, Kristin  
4 Donoghue from Hogan & Hartson for ASkyB.

5 MR. HARDY: Your Honor, Todd Hardy of  
6 Hardy & Ellison for PrimeTime 24, Satellite Carriers.  
7 There were no seats over there.

8 (Laughter.)

9 CHAIRPERSON GRIFFITH: All right. Thank  
10 you very much. Although my colleagues on the panel  
11 object to this, I have determined that the first item  
12 we must discuss with you is the compensation for the  
13 Arbitrators, their fees and expenses as such.

14 We met briefly yesterday for an  
15 orientation meeting with the Copyright Office staff  
16 and we have followed that up with a meeting after that,  
17 among ourselves, and one of the first issues to be  
18 addressed, of course, is the manner in which your  
19 Arbitrators are going to be compensated, that is, as  
20 to their fees and their expenses.

21 I have the impression that perhaps there's  
22 been some discussion among you. If that is so, do you

1 have any proposal that you would like to make to us  
2 concerning the matter in which the Arbitrators are to  
3 be compensated?

4 MR. STEWART: Your Honor, John Stewart.  
5 Your Honor, I've been asked to present the position of  
6 the Copyright Owner parties. We have coordinated  
7 among ourselves. We've not discussed the details of  
8 this with the Satellite Carriers side, but we would  
9 propose first that we split the cost 50-50 and then  
10 secondly with respect to the procedure we would  
11 propose we follow the same procedure that the  
12 Copyright Owners parties followed in the 1990 to 1992  
13 cable distribution CARP which was heard last year and  
14 that is simply that the Arbitrators, the chair of the  
15 CARP would present to the parties shortly after the  
16 end of each month a statement showing the fees and  
17 expenses. Then for the Copyright Owners side we would  
18 seek from the Copyright Office a partial distribution  
19 of the royalties that are already on deposit and  
20 arrange to have payment made of the invoice of our  
21 half of the invoice within 30 days after receiving it.

22 We've not discussed, as I said, a proposal

1 to split it 50-50 and I don't know whether there's any  
2 objection from the other side with respect to that.

3 CHAIRPERSON GRIFFITH: Okay.

4 MR. GLIST: Your Honor, if you would give  
5 me one moment to prepare. Your Honor, that proposal  
6 is acceptable to us if it meets your pleasure.

7 CHAIRPERSON GRIFFITH: Now that we have  
8 your proposal let me give you ours.

9 (Laughter.)

10 And then let's see, maybe take a very  
11 brief recess and see if we can't -- I think close on  
12 this and see if we can't resolve this issue in a  
13 hurry.

14 We discussed yesterday the proposal some  
15 type of an escrow account with the parties  
16 contributing equally, that would be 50-50 between the  
17 Owners and the Carriers. We feel the amount which  
18 would be sufficient to cover the necessary expenses,  
19 all of the expenses and the fees of the Arbitrators  
20 would be approximately \$125,000 per month. The  
21 Arbitrators will submit monthly statements of our fees  
22 and expenses. Those would be our accrued fees and

1 expenses. We would submit those through Ms. Tanya  
2 Sandros of the Copyright Office here who would in turn  
3 present them to you. We would submit those on the  
4 last day of each month when we are in session. For  
5 instance, this month if we anticipate being in session  
6 probably up through March 27th, Friday is Good Friday,  
7 and we would submit the bill to you at that particular  
8 time. We understand the Section 251-54 provides for  
9 the 30-day payment. We request payment in 10 days for  
10 your consideration after receipt of our statements and  
11 so forth.

12 As I stated before, those are the accrued  
13 fees and expenses which we have incurred at that time.  
14 Do you have any response that you would like to make  
15 to that directly or would you like to have an  
16 opportunity to discuss that and see if we can -- I  
17 think we're pretty much in the same -- we have not  
18 considered the possibility of these fees and expenses  
19 being paid from a royalty fund or the royalty fund as  
20 such. I don't think we have any objection to that if  
21 indeed that's available to do so.

22 Do you want a few minutes to discuss that?

1                   Okay, why don't we take about 10 minutes  
2 or so and see if we can't get that resolved.   Thank  
3 you.

4                   (Off the record.)

5                   CHAIRPERSON GRIFFITH:   Yes, thank you.

6                   MR. GLIST:   We've had the opportunity to  
7 confer among each group and together.   We're in a  
8 slightly dissimilar position in that the Joint Sports  
9 and MTA and so forth are able to advance distributions  
10 out of an existing royalty pool in order to accelerate  
11 payments in ways that our side which is a group of, a  
12 coalition of carriers was certainly not anticipating  
13 they would need to do.

14                   What   we'd   like   to   suggest   is   we  
15 understand, at least I think the concern is that you  
16 do not want to be at risk as a panel for some  
17 nonpayment as time accrues.

18                   CHAIRPERSON GRIFFITH:   Judge Cooley is  
19 from Evanston, Illinois and Judge Gulie is from  
20 Baltimore, Maryland. They are fronting the expenses  
21 they incur for transportation and staying here in a  
22 hotel.



1 MR. GLIST: Of course, and what we would  
2 like to suggest is that although the billing should be  
3 as was originally proposed at the end of the month to  
4 be paid after billing to advance the payment to 20  
5 days from the billing and in addition to that, our  
6 side has the authority today to arrange for a payment  
7 of \$25,000 into an escrow so that there would be some  
8 pool and we would assume that the other side could  
9 match that -- there would be some pool to make certain  
10 that the expenses that are being incurred up front are  
11 not carried by you all.

12 So that would be our proposal for trying  
13 to bridge the gap.

14 CHAIRPERSON GRIFFITH: All right, yes.

15 MR. STEWART: Yes, Your Honor, we do  
16 appreciate the difficult position that the Carriers  
17 are in. We are able to help the Copyright Office on  
18 the Satellite funds that have been on deposit since  
19 1992 which we have not had distributed to us. Because  
20 of that, we are able to accommodate your original  
21 request and we'd be happy to accommodate the Carriers  
22 and support their proposal.

1                   This is the first we've heard of the  
2 additional immediate deposit to cover expenses, but we  
3 would be happy to do whatever is necessary to  
4 accommodate the interests of the Panel.

5                   CHAIRPERSON GRIFFITH: All right. It  
6 occurs to me we have an agreement then as to how the  
7 Arbitrators are going to be paid.

8                   Why don't one of you recite that for the  
9 record so that I --

10                  MR. GLIST: The understanding is that each  
11 side, the Carriers on the one side and the Copyright  
12 Owners, Joint Support and so forth on the other side  
13 would advance \$25,000 into an escrow fund which could  
14 be drawn on by the Panel for on-going expenses at this  
15 time, that at the end of a month in which the hearing  
16 is underway, a bill would be submitted by the Panel  
17 and half of that bill would be paid by each side  
18 within 20 days.

19                  THE HON. GULIN: I just want to make sure  
20 we understand that we don't intend, at least I didn't  
21 intend to draw upon this fund during the course of the  
22 month. We'll be submitting our bill at the end of the

1 month, in due course, each and every month.

2 The reason we had proposed some kind of an  
3 escrow fund, frankly, was just for reasons of  
4 timeliness so that at the end of each month when the  
5 bills are submitted, it would be an easy matter to  
6 draw from that escrow fund which is why we suggested  
7 a period of 10 days. Twenty days is certainly  
8 agreeable, but do I understand that this fund will be  
9 replenished each and every month?

10 CHAIRPERSON GRIFFITH: Yes.

11 THE HON. GULIN: Or is this a one-time --

12 MR. GLIST: We had intended it as a one  
13 time because the on-going fees and expenses would be  
14 billed and paid in ordinary course.

15 CHAIRPERSON GRIFFITH: I don't think we  
16 even need a one-time fund for the first month.

17 THE HON. GULIN: No. That's --

18 CHAIRPERSON GRIFFITH: If there's an  
19 agreement to pay them.

20 MR. STEWART: That's fine, Your Honor. I  
21 just wanted to point out that during the Cable  
22 distribution proceedings we had no difficulty in

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1 achieving timely payment of the invoices.

2 CHAIRPERSON GRIFFITH: Fine.

3 MR. STEWART: We can provide you with  
4 copies of the statements that were provided in that  
5 case if it will be useful as an example of an amount.

6 CHAIRPERSON GRIFFITH: All right, I'm sure  
7 we'll have access to those if we want to take a look  
8 at them. So then the understanding is that the  
9 Arbitrators will be paid their fee which is  
10 encouraging --

11 (Laughter.)

12 -- that we will submit our bills at --  
13 let's just say at the end of the month for the accrued  
14 fees and expenses for that particular month, that they  
15 will be paid 50-50 between the Owners and the Carriers  
16 within 20 days from the time that you receive them.  
17 We will submit them through the Copyright Office,  
18 Tanya Sandros, and she will, in turn, submit them to  
19 the parties.

20 Agreeable? All right.

21 The second item I have on -- a substantive  
22 item that I have on our agenda today is the scheduling

1 of these proceedings. Once again at our meeting, we  
2 have discussed this and we are interested first to  
3 know if you have any proposals or proposal concerning  
4 the schedule of this proceeding or would you prefer to  
5 hear what we have discussed first?

6 MS. BEHAN: Your Honor, I'm Kathleen Behan  
7 for the Joint Sports Claimants. It might be helpful  
8 for all of us, although we've had many discussions,  
9 there's also, we understand, some unavailability  
10 issues from the Panel's perspective and there may be  
11 some from our perspective. So while we have discussed  
12 proposals among our side, the Copyright Owners, it  
13 might be helpful to hear what you have to say first.

14 CHAIRPERSON GRIFFITH: All right, good.  
15 What we have, what we would propose to you is  
16 basically this. Number one, we received our  
17 appointment just a short time ago at which time we  
18 were sent some basic information which we have been  
19 involved in reviewing. We met yesterday, the third of  
20 March, in an orientation hearing with Bill Roberts who  
21 was here this morning and Tanya Sandros concerning the  
22 -- how these Panels operate.

1 I have served on one CARP Panel previous  
2 to this so have just a very basic understanding. It  
3 was hearing that was determined on a document  
4 proceeding and there wasn't anything very extensive  
5 about it. So we're sort of new at this.

6 Today, we are having our preliminary  
7 status conference and taking care of all of these  
8 mundane issues. We would propose this then, that we  
9 begin this proceeding on Monday, the 17th day of  
10 March, that we would go each week, Monday, Tuesday,  
11 Wednesday and Thursday. We would not have a session  
12 on Fridays of the week unless that was necessary.

13 We would start at 10 o'clock in the  
14 morning. We would go until 1 o'clock. We would have  
15 a one hour lunch break until 2. We would begin at 2  
16 o'clock and go until 4:30. The Arbitrators when would  
17 meet each day at 4:30 in a quote executive session,  
18 just for our benefit to keep on top of what it is that  
19 you have presented to us, minimum of 30 minutes at  
20 that time.

21 We anticipate that there would be a one  
22 week break between the presentation of your direct

1 cases and your rebuttal cases.

2 We anticipate also that the Register of  
3 Copyrights is likely to want this hearing room for the  
4 first full week in May, whatever week that is. We  
5 would be interested in hearing if you had some other  
6 type of space available where we might continue these  
7 proceedings that week and not have to give up a week  
8 simply for the benefit of the person who owns this  
9 place, Copyright Register.

10 We would not anticipate any other -- that  
11 if there were any other breaks in the -- that they  
12 would be very minimal.

13 We understand that there are approximately  
14 19 witnesses to be presented, I think, in the direct  
15 cases. We tried to estimate yesterday, our hope is  
16 this, that we would conclude that some time in mid to  
17 late May, then we would have the rebuttal proceedings.  
18 The matter would end and we would have and we would  
19 call on you to provide us with your findings of facts  
20 and conclusions of law and we'll set the time periods  
21 as appropriate for that and then we, as the  
22 Arbitrators, would begin making our decision and in a

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1 timely fashion present that to the Copyright Office to  
2 be issued.

3 We have 100 total, as I understand the  
4 regulations, 180 days from yesterday, which I think  
5 Tanya told me yesterday comes out to August 29th. In  
6 order to completely determine this case, we would like  
7 to do so before then.

8 Now with that said, would you like to  
9 respond?

10 MS. BEHAN: Actually, we may need to  
11 discuss with our -- I have one question for  
12 clarification though in terms of the rebuttal case.  
13 You said that there would be one week between the  
14 cases, would that be one week before the submission or  
15 written rebuttal case since you anticipate that or?

16 CHAIRPERSON GRIFFITH: That was suggested  
17 yesterday, if I recall correctly, by Tanya, who is not  
18 in the room, that normally there is a week. I don't  
19 know why we need to take a week off, do you?

20 MS. BEHAN: I think normally you take much  
21 more, you take up to a month and then two weeks of  
22 discovery, submission of cases and then preparation



1 time prior to the hearing. I think it's been a month  
2 in the Cable proceeding so I think we may need a  
3 little more time, actually, than that.

4 CHAIRPERSON GRIFFITH: I don't think we  
5 have any problem with the time period. If you tell us  
6 what you need and as long as it isn't going to  
7 jeopardize us finishing these proceedings within the  
8 statutory rules, the time period provided by the  
9 rules, I don't think we'll have any problem with that  
10 at all.

11 MS. BEHAN: I think it makes sense for us  
12 to take a moment and discuss it.

13 CHAIRPERSON GRIFFITH: You're going to  
14 have the findings of fact and conclusions of law as  
15 well after rebuttal. Do you want us to take another  
16 10 minutes or so? Five minutes?

17 (Off the record.)

18 MS. BEHAN: Your Honor, the Copyright  
19 Owners could basically live with the schedule proposed  
20 by the Panel with one minor modification which is we  
21 do have a witness conflict, in fact, our first witness  
22 who is unavailable on the 17th and the 18th, so we'd

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1 like to start the 19th, but again, we essentially can  
2 live with the schedule. However, we do understand  
3 that the Satellite Carriers do have some other  
4 conflicts in the last two weeks of April. Our concern  
5 about the dates that they are going to propose is that  
6 it may push back the case substantially, given the  
7 need for rebuttal case and factual findings, so that  
8 factual findings aren't done until the end of July, if  
9 you count out all the days that we anticipate needing.  
10 But again, our preference is to go ahead and start on  
11 the 19th.

12 CHAIRPERSON GRIFFITH: All right.

13 MR. GLIST: Your Honor, we did try to work  
14 out with Ms. Behan a joint proposal, so let me just  
15 lay out what our concerns are and the schedule that we  
16 would be more comfortable with.

17 As you know, we were prepared to go  
18 forward starting now. We know that's not realistic  
19 given the overall timing. We could also begin on the  
20 18th and go the 18th, 19th and 20th. We had blocked  
21 off for our witnesses and our counsel the days that we  
22 thought would be consumed with direct which would have

1 begun during this week.

2 I had most of our witnesses and Mr. Paul,  
3 who is general counsel at SBCA, are expected to be at  
4 their National Satellite Convention during the week of  
5 the 24th. That was also the week I had scheduled for  
6 family vacation. I will cancel my vacation, if  
7 necessary. Mr. Paul will abbreviate his presence at  
8 his convention, if necessary. We would prefer to  
9 block that out, if possible.

10 In the following week, I have a -- for 10  
11 years I have taught Cable and Cable Copyright at the  
12 Practicing Law Institute. I have an obligation to be  
13 in San Francisco on that Thursday and Friday, the 3rd  
14 and 4th of April to teach that class and we would be  
15 prepared, we are assuming that there would be no  
16 hearing on Easter Monday, that we would be prepared to  
17 have hearings on the 1st and 2nd, although we might  
18 have to end at 3 o'clock instead of 4:30 on the 2nd.  
19 And we would then be prepared from the 7th of April on  
20 with a clean schedule for our witnesses.

21 I understand that there is some concern  
22 that might push out the ending date. Frankly, when we

1 had estimated, budgeted time, we thought that the case  
2 could be done in substantially less time than has been  
3 talked about here, but if there is a concern about  
4 missing the particular dates that we are seeking to  
5 protect, we think that the rebuttal phase could follow  
6 after only one week for written submission, one week  
7 for discovery and we go to hearing, we think that  
8 would make it up and we think that would accommodate  
9 the various interests of the parties.

10 We would also offer that there is a second  
11 concern that I understand from Ms. Behan that she  
12 prefers not to have the presentation of the Owners  
13 direct case interrupted by these various blackout  
14 dates which is understandable. We would start on  
15 April 7th and go all the way through, but we did not  
16 want to throw out possible hearing dates completely.

17 CHAIRPERSON GRIFFITH: Do you want to  
18 respond?

19 MS. BEHAN: Yes. I'll just say that it is  
20 very important to us not to have our case split up.  
21 I think it's critical and I don't think it makes sense  
22 for the Panel either to have the case split up in a

1 way that is not coherent and we would very much like  
2 to begin this case. We're anxious to start. We've  
3 been trying to work out conflicts. We have gone back,  
4 we have a lot of attorneys on this side and lots of  
5 people do have conflicts, some of the same  
6 conferences, some witnesses are going to the same  
7 conferences. There's another conference that starts  
8 the 7th that actually some of our witnesses are going  
9 to be at, so there are conflicts.

10 We're a little bit concerned about  
11 changing the hearing dates for the conflict of one  
12 person. That being said it's most critical to us that  
13 we be able to present our case effectively so I think  
14 that provided that the Panel come to some reasonable  
15 decision on what kind of conflicts are critical and  
16 what are not critical, are critical belief is that we  
17 be able to present our case together and that we're  
18 ready to go the 19th. We'd be ready by the 7th, but  
19 it's not our preference.

20 CHAIRPERSON GRIFFITH: Okay.

21 MR. HOOVER: Your Honor, for ASkyB, we are  
22 willing to work with the schedules of both sides. We

1 do have some scheduling issues the first two weeks of  
2 April, but I think the way it's playing out that's  
3 probably not going to be an issue because we  
4 anticipate having a very narrow focus and going to the  
5 end of the case, perhaps only for two days on the  
6 local prima facie issue. So whatever the Panel  
7 decides would end up being fine. I'm sensitive to Mr.  
8 Glick's schedule and his client as well as to the  
9 desire to start on the 17th on the other party and I  
10 would hope that we would work something out so that  
11 everybody gives a little, but nobody has to give up a  
12 lot. So that's our sentiment.

13 We also agree that there does not need to  
14 be 30 days between the direct case and the rebuttal.  
15 I don't think the point of this is to create a second  
16 different case. I think a week for written rebuttal  
17 and then a week for additional rebuttal can be  
18 handled. You had suggested one week. They're  
19 suggesting a month. We think two weeks would be  
20 ample.

21 CHAIRPERSON GRIFFITH: Thank you.

22 MS. BEHAN: I just have one thing on the

1 rebuttal case. We do think that we need the 30 days.  
2 I think that's the minimum that the rebuttal case has  
3 ever taken in these types of proceedings and it has to  
4 do, in part, with the fact that there's a right to  
5 discovery, a right to make objections and there may be  
6 actually motions that you'll have to rule on. It's a  
7 great deal and we do plan to present witness  
8 testimony, if necessary, to deal with rebuttal issues.  
9 So we think 30 days is going to be necessary. It may  
10 be something we'll know more about as we get through  
11 the case, but we're not as optimistic as they are.  
12 That being said, I agree that we want to try to work  
13 something out that's reasonable, given the likelihood  
14 of conflicts that will arise all through the  
15 proceeding.

16 CHAIRPERSON GRIFFITH: All right. Did you  
17 have a comment you wanted to make?

18 MS. WOODS: I just wanted to reiterate the  
19 point on rebuttal. Based on our experience in the  
20 Cable CARP which I think was as extensive as this one,  
21 although there are more parties here today, by the  
22 time -- the same lawyers are preparing the written

1 rebuttal cases, submitting them and there are  
2 requirements in the rules. I won't go through all of  
3 them, but as to rights on discovery, timing and  
4 motions and we just don't see how that could possibly  
5 be accommodated in a week or two.

6 CHAIRPERSON GRIFFITH: I'm sitting here  
7 reminding myself of all the times that I am an  
8 Arbitrator now and not a Circuit Court Judge. This  
9 would never have occurred, as you understand. We  
10 would have -- I would have set the times, the periods  
11 and things like that, but we are attempting to  
12 accommodate you in any way possible.

13 A great fear that we have at the moment is  
14 that we're going to accommodate you, we're going to  
15 make you very happy and finish the case on August 27th  
16 and have to write our opinion and so forth and turn it  
17 in by the 29th.

18 Do you have any comments you want to make  
19 before we --

20 THE HON. COOLEY: Would it help to start  
21 anything sooner? I have the same fear as Judge  
22 Griffith. Are there going to be opening statements,

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1 for example? is there going to be an opening  
2 statement that proceeds the Claimant's case and is  
3 that going to take a day, two days, an hour? What?

4 MS. BEHAN: I think from our side no more  
5 than an hour, an hour and a half which is why we  
6 anticipated doing it on the same day that our case  
7 begins.

8 THE HON. COOLEY: Some letter that came  
9 through here said something about maybe doing  
10 something later this week. Is that a possibility to  
11 get anything started this week? I have cleared this  
12 week out based upon that.

13 The other thing is, as I understand what's  
14 happening here, I think that people are starting to  
15 talk about starting on April 7th. Is that what I'm  
16 hearing?

17 MS. BEHAN: That's their side. Our  
18 position is the 19th.

19 THE HON. GULIN: You wish to start on the  
20 19th if your case is not broken up. Is that your  
21 concern, that these few days in April that they're  
22 requesting would disrupt your case?

1 MS. BEHAN: Absolutely. I think that  
2 they're requesting an entire week to 10 days to --  
3 between our cases and I think that that would be  
4 distracting for everybody in terms of the  
5 presentation, but we do think it might prejudice us a  
6 little bit we don't know what the unavailability is,  
7 the week of the 10th. We'd be willing to move up, I  
8 think, subject to me confirming to the 13th and start  
9 our whole case on the 13th if that's a possibility.

10 MR. GLIST: The 13th of what?

11 MS. BEHAN: The 13th of March.

12 THE HON. GULIN: Yes.

13 CHAIRPERSON GRIFFITH: I think we're  
14 available. We can start on the 13th. The only --  
15 what we had planned to do with our proposal beginning  
16 on the 17th is that would give us an opportunity now  
17 to spend the next few days going through all of the  
18 documents pertaining to your direct case.

19 However, beginning -- I'm available to  
20 start on the 13th.

21 THE HON. GULIN: Well, we're available,  
22 but you understand that we're not available the week

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1 of the 17th, so if you're concerned about breaking up  
2 your case --

3 MS. BEHAN: That was the week that we had  
4 agreed to start.

5 THE HON. GULIN: The week of the 10th, I  
6 apologize.

7 MS. BEHAN: We're available to start on  
8 the 13th.

9 MR. GLIST: The 13th is fine.

10 CHAIRPERSON GRIFFITH: As a matter of  
11 fact, we could -- the only reason, quite frankly,  
12 well, there are several reasons, but if we wanted to  
13 pick up some days we can certainly go on Fridays if  
14 it's agreeable to you. I prefer the opportunity to  
15 have Fridays to catch up on anything with respect to  
16 this. I do have a life which I like to keep abreast  
17 of, so we could, we certainly could, for instance, we  
18 could go on the 13th, we could go, if available, that  
19 Friday as well, the 14th and then begin the next week,  
20 the 17th, going Monday through Thursday.

21 MS. BEHAN: That would work quite well with us,  
22 yes.

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1 CHAIRPERSON GRIFFITH: How about over  
2 here? Would that be agreeable with you?

3 MR. GLIST: I thought you had a witness  
4 conflict.

5 MS. BEHAN: If we start the 13th, then the  
6 conflict is erased.

7 MR. GLIST: The 17th through the 20th,  
8 that would be acceptable, sure.

9 CHAIRPERSON GRIFFITH: We start on March  
10 13th. WE go March 14th as well and we pick up again  
11 on March 17th and we go Monday, Tuesday, Wednesday and  
12 Thursday of each week thereafter until we get into  
13 your situation in April.

14 THE HON. COOLEY: I just want to point out  
15 there is one date in April, it's a Monday that I  
16 unfortunately can't be available. That's April 14th.  
17 So we could start on Tuesday of that week, if that's  
18 a week that we're all planning to get together.

19 MR. GLIST: Your Honor, do I understand  
20 that Mr. Paul's schedule and my vacation of March 24  
21 is off?

22 CHAIRPERSON GRIFFITH: Well, why don't we

1 do this, now that we have heard that you would be in  
2 a position to start your case on the 13th, and we have  
3 heard what your requests are with respect to the April  
4 dates and so forth, why don't you give us 10 minutes  
5 and let us go in now and try to come up with a  
6 proposed schedule. Is that agreeable?

7 MR. GLIST: That's agreeable.

8 CHAIRPERSON GRIFFITH: Tell us once more,  
9 you have, I know, two days where you have to teach.

10 MR. GLIST: Yes, April 3rd and 4th are the  
11 PLI courses. March 24th through 28th is a pre-  
12 emptable vacation, but one at personal cost.

13 CHAIRPERSON GRIFFITH: All right.

14 MS. BEHAN: Your Honor, I just wanted to  
15 say that if we started on the 13th, I think it's  
16 possible that we could finish the early part of the  
17 week of his vacation, if not before, and we'd be  
18 willing to try to accommodate there and try to finish  
19 our case, because then if there's a split it doesn't  
20 prejudice one party or the other because we've split  
21 at the end of our case.

22 The one possibility is that we need to go

1 a Saturday to get to the 24th, but I know that's not  
2 people's preferences.

3 CHAIRPERSON GRIFFITH: It's a possibility.

4 MS. BEHAN: But anyway, I think that makes  
5 it much more likely that we'll be able to accommodate  
6 their concerns.

7 CHAIRPERSON GRIFFITH: Do you withdraw  
8 your objection with respect to the 3rd and 4th?

9 MS. BEHAN: Yes, if we start on the 13th,  
10 we withdraw our objection to the 3rd and 4th.

11 THE HON. COOLEY: Just so I understand,  
12 you'd go through the whole week of the 17th, including  
13 Friday and possibly Saturday.

14 MS. BEHAN: Yes.

15 MR. GLIST: I'm sorry, Your Honor. March  
16 21st is a religious holy day in the Bahai Faith and  
17 that would be blacked out for me.

18 MS. BEHAN: Okay, then we'd go on the 24th  
19 and 25th, so he'd miss a little bit of his vacation,  
20 but have the last --

21 THE HON. COOLEY: Where are you going?

22 CHAIRPERSON GRIFFITH: Why don't one of

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1 you and I already have a volunteer standing in the  
2 back apparently --

3 (Laughter.)

4 -- so that we can be clear that we have an  
5 understanding now with respect to this, why don't one  
6 of you simply state for us what is our schedule going  
7 to be.

8 MS. BEHAN: Okay.

9 CHAIRPERSON GRIFFITH: Start on the 13th.

10 MR. GLIST: My understanding is that we  
11 would begin on the 13th with short opening statements.  
12 There would also probably be some preliminary motions  
13 to be considered at that time. There might also be  
14 motions in advance of each witness later on in the  
15 hearing. We would be the 13th and 14th. We would  
16 begin again on the 17th of March and go through  
17 thursday, the 20th. At that point, we would expect  
18 that the presentation of the direct case of the  
19 Copyright Owners is likely to conclude, but we could  
20 use a weekend day, if necessary.

21 MS. BEHAN: I think that that's too few  
22 days, because of taking out the 21. We've got 13

1 witnesses, the lion's share of the witnesses and we're  
2 trying already to fit them into nine days. But if we  
3 take off the 21st and the 22nd, it seems to me we'll  
4 have to go into the 24th and 25th. So as I understand  
5 it, our proposal would be to start the 13th and we  
6 would anticipate at least putting on one witness that  
7 day, in addition to openings, going to the 14th,  
8 perhaps the 15th, if necessary, the 17th through the  
9 20th, the 24th and 25th.

10 MS. WOODS: We could do the 22nd?

11 MS. BEHAN: Yes, the 17th through the  
12 20th, the 22nd, the 24th and 25th.

13 CHAIRPERSON GRIFFITH: Okay. that would  
14 be the presentation of the Owners?

15 MS. BEHAN: Yes.

16 CHAIRPERSON GRIFFITH: In other words, at  
17 the very latest the 25th provided we didn't go on  
18 Saturday?

19 MS. BEHAN: Right, there's some ambiguity  
20 because cross may be longer than our directs, but  
21 that's what we anticipate, that's our guess.

22 CHAIRPERSON GRIFFITH: Okay. The proposal

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1 with respect to the other party?

2 MR. GLIST: If the direct case of the  
3 Copyright Owners is concluded at that time, we could  
4 certainly begin the presentation of our witnesses on  
5 March 1st, April 1st and go through mid-afternoon on  
6 the 2nd.

7 It might be preferable in order to not  
8 have them interrupted we have witnesses who we expect  
9 will take four days of hearing, if I anticipate my  
10 cross properly. It might be better to simply begin  
11 them on April 7 and run through that Thursday.

12 CHAIRPERSON GRIFFITH: April 1st, April  
13 2nd and begin on April 7th and go through the thursday  
14 the 10th?

15 MR. GLIST: I think, sir, what I was  
16 suggesting is that because our case would be also  
17 interrupted if we began on the 1st, although that's  
18 possible if -- it might be better to begin our case on  
19 the 7th which would give four uninterrupted hearing  
20 days so that the presentation of our case and the  
21 cross examination would likely be concluded during  
22 that week.

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1 CHAIRPERSON GRIFFITH: If you began on the  
2 7th, you think you could conclude on the 10th?

3 MR. GLIST: Yes sir.

4 MR. HOOVER: And we could follow with what  
5 we would expect would be two days on the local issue  
6 and the 14th is unavailable to one of th Panels so we  
7 could fill the 15th and 16th.

8 CHAIRPERSON GRIFFITH: 4/15 and 4/16 is  
9 what you're asking.

10 MR. STEWART: I would like to -- the  
11 Intellectual Property Panel that I'm speaking on on  
12 the 9th, if it were possible to make the case on the  
13 1st -- Your Honor, I'm willing to accommodate  
14 whatever schedule works out.

15 CHAIRPERSON GRIFFITH: Thank you.

16 MR. GARRETT: I just remind everyone that  
17 April 1st is also opening day.

18 MS. BEHAN: I'd just make two comments  
19 which is one, we would anticipate that there would be  
20 openings at the start of each of their cases and in  
21 light of that, the dates that they set out, 4 and 2,  
22 and in light of the cross that we anticipate, maybe a

1 little optimistic. Now we don't have any problem with  
2 the dates starting as Mr. Stewart indicated on the 1st  
3 and just going, continuously, but there may be a  
4 little room in there. I'm not sure that we're going  
5 to end on the 16th.

6 CHAIRPERSON GRIFFITH: I just want to ask  
7 one other question. Am I to conclude from these  
8 discussions then that all of the presentation of the  
9 case, direct cases are going to be concluded by April  
10 16th?

11 MS. BEHAN: Approximately that date, yes,  
12 16th to the 18th perhaps.

13 CHAIRPERSON GRIFFITH: That's much better  
14 than I thought.

15 Why don't you give us about 10 minutes and  
16 see if we can't -- don't go far. We won't take long.  
17 Just to make sure we have it straight and that we are  
18 available.

19 MR. HOOVER: Your Honor, I wanted to raise  
20 -- we sent in a letter yesterday regarding segmenting  
21 off the local issue on our two days. We weren't  
22 planning to participate in the process. I don't know

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1 whether you'd like to take the ten minutes to get the  
2 schedule penned out and then deal with that or whether  
3 you wanted to deal with that now.

4 CHAIRPERSON GRIFFITH: Why don't we get  
5 the schedule penned out?

6 MR. HOOVER: Very good.

7 CHAIRPERSON GRIFFITH: Thank you.

8 (Off the record.)

9 CHAIRPERSON GRIFFITH: Okay, ladies and  
10 gentlemen, we have had a five minute recess. What we  
11 propose is this: that we begin with the Owners on  
12 March 13th, March 14th, March 17th through the 20th  
13 and if necessary, March 24 and 25 at which time you  
14 will have concluded your case. All right?

15 We will begin with Users over here, April  
16 7th through the 10th. Okay?

17 How do I identify --

18 MR. HOOVER: ASkyB.

19 CHAIRPERSON GRIFFITH: Okay, ASkyB. April  
20 15 and April 16. At that time that will conclude the  
21 direct presentation of the direct cases.

22 I have not and I presume my colleagues are

1 not -- in the time period which are provided by the  
2 regulations if there are any concerning the break  
3 between, if there is such a break between the  
4 presentation of the direct case and the rebuttal case.  
5 You wanted a month, someone over here said we could do  
6 it in two weeks.

7 MS. WOODS: Could we submit proposals to  
8 you, perhaps?

9 CHAIRPERSON GRIFFITH: Why don't you do  
10 that instead of wasting a lot of time here this  
11 morning, back and forth.

12 MS. WOODS: We'll see if we can agree and  
13 if not, we'll give you written proposals.

14 CHAIRPERSON GRIFFITH: We have an  
15 agreement now, an understanding with respect to the  
16 presentation of the direct cases.

17 Okay? Now just one other thing and let me  
18 see, I don't want to open up anything unusual, but I  
19 just want to know, are there any preliminary matters  
20 which need to be resolved today? Quite frankly, we  
21 have not had an opportunity to review your cases,  
22 direct cases yet.

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1 MR. HOOVER: Your Honor, the letter that  
2 we sent in yesterday, dated March 3, American Sky  
3 Broadcasting, limiting the testimony of the ASkyB  
4 witnesses to the local transmission issues and I think  
5 everyone is in agreement that it's fine if we go at  
6 the end of the direct case.

7 The Copyright Owners had a chance to  
8 address in their direct testimony the local issues.  
9 There was an additional 60 days granted and you may  
10 have seen some of the papers on that for that specific  
11 purpose. It's our belief that they did not do so.  
12 They have not addressed the local issue and therefore  
13 we would not plan to clog up the proceeding by  
14 participating in cross up until our case is put on at  
15 which point they'll have a chance to cross examine our  
16 witnesses. We would want to have an understanding of  
17 the Panel that they would not be trying to put in  
18 testimony as part of the Copyright Owners affirmative  
19 case while we are not there beyond the absence of it  
20 in their direct testimony.

21 So we would essentially need a ruling from  
22 you that the Local issues would be dealt with at the

1 end of the case on the 15th and 16th and they could do  
2 as much cross as they want on that issue and that  
3 would eliminate the need for us to clog up the  
4 proceedings up until that point and we would not plan  
5 to be present for the proceedings up until that point.

6 CHAIRPERSON GRIFFITH: Any response?

7 MR. GARRETT: Your Honor, Bob Garrett for  
8 the Joint Sports Claimants. First of all, I believe  
9 that our testimony and the testimony of other  
10 Copyright Owners does relate to relevant to the local  
11 issue here. ASkyB may not agree with that, that  
12 certainly is their choice, but when it comes time to  
13 writing out a proposed findings dealing with the local  
14 issue, we will be referencing testimony that we are  
15 going to be presenting during our direct case.

16 Secondly, I certainly agree with the  
17 statement that we may not put in evidence or testimony  
18 other than that which we've already submitted here and  
19 the rules deal with that. The rules make it clear  
20 that we may not materially supplement our written  
21 direct cases and that rule applies to us and it  
22 applies to everyone in this proceeding. If at any

1 time during the proceeding any counsel feels that the  
2 other side is attempting to materially supplement they  
3 are certainly free to make an objection at that point  
4 and it will require ASkyB's presence so during the  
5 hearing to make that objection.

6 Also, while I can understand their desire  
7 to segregate this as a special issue here, it is also  
8 something, as I said, we will be presenting evidence  
9 on and not only in our direct case, but we reserve the  
10 right to present evidence during rebuttal case, as  
11 well.

12 Let me also say that the local issue, as  
13 it's been identified here, raises a threshold of legal  
14 issues as well. It's an issue as to whether or not  
15 under the statute they're entitled to retransmit local  
16 signals locally o r retransmit these signals into wide  
17 areas. We had raised that issue with the Copyright  
18 Office at the outset of this proceeding. We asked them  
19 to conduct a separate proceeding to deal with that  
20 issue. The Copyright Office chose not to do that. I  
21 believe they referred that issue to you.

22 We will be submitting a motion directed to



1 that threshold legal issue at the conclusion of the  
2 direct cases. We think it's important that the Panel  
3 have the opportunity to hear our evidence, their  
4 evidence. We will be submitting a motion during that  
5 threshold legal issue at the conclusion of the ASkyB  
6 case.

7 CHAIRPERSON GRIFFITH: All right.

8 MS. WOODS: Michelle Woods, sorry --

9 MR. HOOVER: Your Honor, with all due  
10 respect, I think that it puts a different burden on  
11 you because their factual contention and they address  
12 the whole issue, you can look through their papers and  
13 not find any specific reference to the adjustment of  
14 rates to the local and they mention the word "local"  
15 but it doesn't get to the core issues as presented in  
16 our direct testimony. It puts you in a difficult  
17 position because I can stand up and say well, we've  
18 referred to it somewhere, therefore they should have  
19 to spend the next four weeks sitting here waiting to  
20 see whether we try to sneak something in and frankly,  
21 Your Honor, they'll have ample opportunity on cross to  
22 deal with this in terms of the legal motion. They

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1 made that motion before as Mr. Garrett said and it was  
2 denied, but I really think in the interest of  
3 efficiency of this proceeding and the fairness, quite  
4 frankly, and the difference between the two issues,  
5 that we would like to be assured that the local issue  
6 is dealt with on April 15, 16, 17 and if another day  
7 is needed and that it be dealt with at that time.  
8 Otherwise, you're going to have constant problems with  
9 -- first of all, we would be forced to sit through the  
10 entire thing and we don't intend to cross examine on  
11 the distant issue at all and it will constantly be a  
12 battle of having to listen to see if the word "local"  
13 is mentioned and then jumping up and my guess is you  
14 would end up ruling, let's take care of that at the  
15 end anyway.

16 CHAIRPERSON GRIFFITH: Yes.

17 MS. WOODS: Yes, Your Honor, Michelle  
18 Woods for the Public Broadcasting Service. I just  
19 wanted to reiterate that or to join with Mr. Garrett  
20 in saying that we also plan to file a motion on the  
21 threshold legal issue at the conclusion of the direct  
22 cases and also that we do agree that our evidence

1 addresses the value of local signals as well as  
2 distant.

3 CHAIRPERSON GRIFFITH: Okay. If I  
4 understand, you both intend, both parties here, the  
5 Owners and Users, to make motions at the conclusion of  
6 your direct case, your case concerning the local issue  
7 and something may come up, but what he's asking quite  
8 frankly is to have a determination made or wait until  
9 the end of your respective direct cases, segregate  
10 that out and actually hear on April 15th, 16th and if  
11 necessary the 17th the matter which has been raised  
12 with respect to the local issues.

13 Do you have any comment on --

14 MR. STEWART: Yes, Your Honor, I believe  
15 counsel can correct me if I'm wrong, but it was the  
16 position of a number of the Copyright Owners,  
17 including ours, that this quote local issue should not  
18 be resolved at all in this proceeding. We ask it to  
19 be a separate proceeding.

20 It is the position of ASkyB that it  
21 should, in fact, be part of this proceeding. It  
22 sounds to me like what counsel is asking you to do is

1 to make what, in effect, would be a substantive  
2 determination as to the relevance of all the evidence  
3 in this proceeding which he has to have consolidated  
4 with his issue in advance of hearing any of that  
5 evidence and that seems not to be appropriate.

6 MR. REMINGTON: Your Honor, Mike Remington  
7 on behalf of BMI. I associate myself with the views  
8 of Mr. Stewart.

9 CHAIRPERSON GRIFFITH: Okay.

10 THE HON. GULIN: I'd like to put a  
11 question to you, sir, ASkyB. What is it specifically  
12 you are looking for us to do? You want to grant a  
13 motion in limine that you may not address, that no one  
14 may address certain evidence and if that's the case,  
15 who is going to be here to enforce that motion if it  
16 does arise?

17 MR. HOOVER: We would be happy to make a  
18 formal motion in limine. In fact, we challenge anyone  
19 to point to the references in a brief where this is  
20 substantively addressed. There was a 60-day extension  
21 in the filing of direct testimony, specifically to  
22 deal with the local issues, for whatever strategic

1 reason it was not dealt with and in fact, there were  
2 some papers put in saying they'd like to supplement  
3 later which demonstrates that it was not dealt with  
4 and so yes, we would like to make a motion to deal  
5 with the local issue at the conclusion on April 15, 16  
6 and 17 if necessary and the two issues are very  
7 distinct, referenced by the fact they're saying they  
8 want to have a separate proceeding. There's been a  
9 ruling it should be part of this proceeding, but that  
10 doesn't mean that it can't occur at the end of the  
11 case. So we would like to make that motion. We would  
12 be happy to submit it in writing within a day or two  
13 and they would have an opportunity then to show you  
14 where they have supposedly dealt with this issue,  
15 because I don't think it's proper to expand under the  
16 rules the scope of direct.

17 CHAIRPERSON GRIFFITH: Well, I think  
18 you're asking, in a sense, for us to do something at  
19 this moment when we haven't even had an opportunity to  
20 review the material which has been filed by the  
21 respective parties in support of their cases, their  
22 direct cases.

1 MR. HOOVER: I understand.

2 CHAIRPERSON GRIFFITH: What I'm going to  
3 suggest to you then is why don't the respective  
4 parties file, you file your motion, they can respond  
5 if they wish in writing and we will address that  
6 matter at th earliest available time beginning no  
7 earlier than March 13th at which time hopefully, we,  
8 that is, each of the Arbitrators will have had an  
9 opportunity to review in detail the cases in direct  
10 which have been submitted to us.

11 MR. HOOVER: Very well, Your Honor. We  
12 are in the position to file that by this Friday. If  
13 you want to go ahead and establish a schedule for the  
14 response, perhaps you'd be in a position to rule  
15 sooner than the morning of the start of the March 13th  
16 --

17 CHAIRPERSON GRIFFITH: How about a  
18 response by the close of business on the -- that only  
19 gives them what, if you file it on Friday, the 7th,  
20 that only gives them 3 days to consider it and  
21 respond.

22 MR. HOOVER: Your Honor, we'll move our

1 filing up to Thursday. We'll file on the 6th.

2 CHAIRPERSON GRIFFITH: Now we've got one  
3 more day.

4 (Laughter.)

5 CHAIRPERSON GRIFFITH: I'm not going to  
6 require them to respond in that short a period of  
7 time. Do you agree? I've got to start getting  
8 agreement on my co --

9 THE HON. COOLEY: Unless there's no  
10 objection.

11 CHAIRPERSON GRIFFITH: Do you have any  
12 objection? If you can do it by like Tuesday or  
13 something that's fine.

14 MR. GARRETT: Your Honor, without having  
15 seen the motion, it's difficult to know. I still am  
16 not certain I understand what this motion is.

17 CHAIRPERSON GRIFFITH: Yes.

18 MR. HOOVER: Your Honor, the motion will  
19 be very simple. We will point out that it has not  
20 been addressed to this point. it will then be up to  
21 them to attempt to convince you that it has been  
22 addressed. It will be a very short motion. There is

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1 a record in the case already in terms of what was  
2 submitted, what wasn't. We said we would object to  
3 attempt to try to expand direct. So I would suggest  
4 we'll file a very short motion on thursday and ask  
5 that it be decided by the time we would have to get  
6 the corporate denial to come and participate in the  
7 hearing.

8 MS. WOODS: Your Honor, with all due  
9 respect I would expect a response might take some  
10 additional time because we really will have to go  
11 through the substance of our testimony if I understand  
12 the motion we may be receiving to point out where we  
13 believe we have addressed issues that relate to  
14 ASkyB's request and that might take some time.

15 CHAIRPERSON GRIFFITH: Let us have just  
16 one minute here.

17 (Pause.)

18 CHAIRPERSON GRIFFITH: Ladies and  
19 gentlemen, ASkyB, if you want to file your motion by  
20 the close of business on Thursday, I will direct the  
21 other parties to respond to your motion by the close  
22 of business on Wednesday the 12th and the Arbitrators



1 will determine your motion as soon as possible  
2 thereafter. You may have to be here for the first few  
3 days, if we rule against you, you may have to be here  
4 all of the time.

5 MR. HOOVER: We'll submit by thursday.

6 CHAIRPERSON GRIFFITH: All right, fine.  
7 Are there any other matters that we need to address at  
8 this particular time or are we ready to adjourn until  
9 10 o'clock a.m. on March 13th?

10 MR. GLIST: Your Honor, I do have a  
11 matter, I am assuming that motions with respect to a  
12 particular witness's testimony would be dealt with  
13 when that witness is present. However, there is  
14 certain evidence that has been proffered to you by PBS  
15 and by MPAA for which there is no sponsoring witness  
16 and there are 9 witnesses whose testimony from prior  
17 proceedings has been incorporated by reference.

18 Under the rules under which we have been  
19 operating, there has been no opportunity for  
20 discovery. There is no sponsor. There is no voir.  
21 There is no cross examination. And I could at some  
22 time that you designate, make an appropriate motion to

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1 deal with this, but I would like to know whether I  
2 should be dealing with it today, opening day of  
3 hearing, in writing, orally, as you wish.

4 CHAIRPERSON GRIFFITH: All right, yes?

5 MS. WOODS: Your Honor, Michelle Woods,  
6 responding on behalf of PBS and I believe n behalf of  
7 MPAA as well, although Mr. Collins may supplement my  
8 remarks.

9 It is our view that this issue was briefed  
10 and ruled on by the Copyright Office previously and  
11 that this evidence is admissible in this proceeding  
12 for the purposes that are set forth in the Rules that  
13 govern this proceeding, so we don't feel further  
14 briefing is appropriate at this time.

15 MR. GLIST: Your Honor, Ms. Woods is  
16 correct that we did file a motion before the Copyright  
17 Office and we were basically told the rule says you  
18 can incorporate by reference. They're incorporating  
19 by reference. I think what we are raising is  
20 something that goes to a fundamental due process right  
21 of confrontation. If you wish to deal with it as  
22 though it is a weight of the evidence to be accorded

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1 to a party that has not been subjected to cross  
2 examination, we could live with that, but we think  
3 that there's a fundamental problem that needs to be  
4 addressed. With due respect to the fact that we  
5 briefed it to the Copyright Office and got referred to  
6 the rule, we think there's something wrong with  
7 applying that rule to this proceeding. A rule that is  
8 applicable among those parties in their own  
9 distribution proceedings when year after year, they  
10 raise the same issues among themselves is one thing.  
11 Raising that in a case in which parties like us who  
12 never participate in those distribution proceedings  
13 and telling us there's just no chance for  
14 confrontation or examination or discovery is quite  
15 another. And so what we're raising here, we  
16 understand what the regulation says because the  
17 Copyright Office has told us. What we're raising with  
18 you all is we think that's wrong. We think those nine  
19 witnesses' testimony should not be considered as  
20 evidence in this proceeding.

21 CHAIRPERSON GRIFFITH: Okay, one more and  
22 then I just want to ask a question -- let me ask my

1 question first.

2 At this juncture today, how could we  
3 possibly rule on that? Isn't that something that's  
4 going to have to come up as the party presents the  
5 witness or th testimony or the evidence offers it at  
6 which time you will have to object to it?

7 Now having asked this question or made  
8 this statement, let me confer with my colleagues and  
9 see if they agree? Okay?

10 (Pause.)

11 Okay, I apologize for just responding, I  
12 should consult with them first. Bad habit. I'll get  
13 over it.

14 So my answer, I guess, is quite frankly  
15 and I presume my co-Arbitrators agree is it appears to  
16 me not having had the opportunity, quite frankly, to  
17 read the material you're talking about, is that that  
18 is something that is going to have to be addressed as  
19 the witness or the evidence is offered at that time.

20 MR. GLIST: There is no witness which is  
21 the only reason I'm raising it with you today.

22 CHAIRPERSON GRIFFITH: There are some

1 instances where there is no witness. All right.

2 MR. GLIST: Nine.

3 CHAIRPERSON GRIFFITH: Nine. Okay. Then  
4 we will have to set aside a time if we are going --  
5 unless it has previous -- unless we determine after  
6 having reviewed the information which has been  
7 provided to us by the Copyright Office that it has  
8 been ruled on, and if we do so determine, then we  
9 will, I presume, uphold their ruling, otherwise we'll  
10 have to set aside a time to hear you out on that.

11 I don't think we can do that today.

12 MR. GLIST: Okay, I understand that, Your  
13 Honor.

14 MS. WOODS: Yes, we would want the  
15 opportunity to brief that again if it is raised again.

16 CHAIRPERSON GRIFFITH: I understand.  
17 Okay.

18 MR. GLIST: I had two other suggestions  
19 that I would like to offer.

20 CHAIRPERSON GRIFFITH: So far we've taken  
21 away your vacation, now what else --

22 (Laughter.)

1 MR. GLIST: I'm not faring very well. We  
2 have been trying to economize on hearing time as you  
3 have already seen. And what we wanted to do is just  
4 alert the parties that we are going to remove a Mr.  
5 Frazier as a witness. We've looked at the evidence  
6 that's been presented by all of the parties and we've  
7 concluded that it would just not be worth the time to  
8 advance that. Not very long testimony, but we're  
9 trying to remove what we can.

10 My second point is that it might  
11 facilitate the cross examination of witnesses if all  
12 parties who have not already submitted direct cases  
13 with line numbers submitted them with line numbers.  
14 Some parties have and some have not, but it, I think,  
15 would expedite cross examination if the pre-filed  
16 written direct could simply be resubmitted with line  
17 numbers associated with the testimony.

18 CHAIRPERSON GRIFFITH: Educate me, is  
19 there any provision where we can require that?

20 MR. GLIST: I think, Your Honor, that you  
21 can conduct this proceeding as you think best can be  
22 conducted.

1 MS. WOODS: There's nothing in the rules  
2 that required us to submit our direct case that way  
3 and frankly, we would hope not to be put to the burden  
4 of doing that at this time.

5 CHAIRPERSON GRIFFITH: The motion is  
6 denied.

7 Anything further? All right, ladies and  
8 gentlemen, thank you very, very much. We will see you  
9 promptly, ready to go on Thursday, March 13th at 10  
10 o'clock a.m. in this room. Keep in mind, please that  
11 there may be a time during the rebuttal it appears now  
12 where we would seek out some other space, but as it  
13 stands right now, everything will be conducted right  
14 here.

15 (Whereupon, at 12:08p.m., the pre-hearing  
16 conference was concluded.)

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18  
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CERTIFICATE

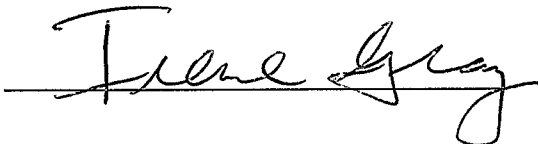
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Before: Library of Congress  
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Date: March 4, 1997

Place: Washington, DC

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